STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE HUDSON,

Plaintiff-Appellant,

v

CANTERBURY HEALTH CARE, INC. and CANTERBURY-ON-THE-LAKE,

Defendants-Appellees.

UNPUBLISHED
December 17, 2013

No. 310679
Oakland Circuit Court
LC No. 2011-118053-NO

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals by right the order granting defendants' motion for summary disposition in this negligence action. We affirm.

Plaintiff first argues that the trial court erred in holding that there was no genuine issue of material fact regarding whether defendants owed a duty to plaintiff to restrain and control the birds housed in defendants' facility, and thus, the trial court erred in granting defendants' motion for summary disposition. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court will only consider "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. A genuine issue of material fact exists "when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (internal citation and quotation omitted).

This Court has recognized two causes of action against domestic animal owners: strict liability and general negligence. *Hiner v Mojica*, 271 Mich App 604, 609; 722 NW2d 914 (2006). Plaintiff has only alleged a cause of action for negligence. To establish a cause of action for negligence, plaintiff must prove that: "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Specifically for domestic animal owners, plaintiff must prove negligence in the "failure to exercise ordinary care in controlling or restraining a domestic animal." *Hiner*, 271 Mich App at 609.

The trial court correctly held that there was no question of fact regarding defendants' negligence in failing to control or restrain the birds because defendants did not owe a duty to plaintiff. Plaintiff did not allege that defendants' birds had dangerous propensities; however, defendants could still be held liable if they negligently failed to "restrain the animal or prevent harm by the animal." *Id*. at 612. However, this Court has been clear that "[c]ertain domestic animals are regarded as so unlikely to do substantial harm that their owners have no duty to keep them under constant control." *Id*. This classification of domestic animals includes "dogs, and some other domestic animals," *Trager v Thor*, 445 Mich 95, 105-106; 516 NW2d 69 (1994) (citing 3 Restatement Torts, 2d, § 518, comment j, p 32), such as "cats, bees, pigeons and similar birds and also poultry . . . ," 3 Restatement Torts, 2d, § 518, comment j, p 32. Defendants housed certain birds of various colors, larger in size than robins, but smaller than pigeons, and thus, these birds would fall into the category included in *Trager*.

Because there is no record that defendants knew of any dangerous propensities of the birds, then, in order to hold defendants liable for negligence, plaintiff must show that defendants were "aware that the animal is in such a situation that a danger of foreseeable harm might arise." *Hiner*, 271 Mich App at 612-613. Defendants could be liable if, based on the situation, they failed to exercise the amount of control required "based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." *Id*. (further citation and quotation omitted.) Here, there is no factual dispute regarding whether defendants constantly restrained the birds; in fact, the birds were frequently released from their cages as part of the program to stimulate the residents. This issue rests on a legal question alone – whether defendants actually had a duty to plaintiff.

The trial court correctly held that defendants were entitled to judgment as a matter of law because no duty was owed to plaintiff. Defendants were not aware of any situation in which having free roaming birds would cause foreseeable harm. There is no evidence of prior incidents with the birds harming people in defendants' facility, and defendants' employees testified that they never observed a bird scaring a person in the facility.[1] This Court has found that a defendant was aware of a situation of foreseeable harm when the animal in question was

[1] Although plaintiff contends that Betty Thomas testified that she observed individuals scared of the birds when they flew, she clarified that she could not say if the individuals were afraid, but they may have been startled.

involved in a prior incident. In *Hiner*, this Court held that because the defendant's dog was aggressively barking and approaching an individual, the defendant was then aware of a situation of foreseeable harm when that individual returned to the defendant's house. *Hiner*, 271 Mich App at 613-614. Similarly, the Court in *Trager* held that the defendant was aware of a situation of foreseeable harm and should have exercised greater care because he knew that his dog had bitten a child before the incident at issue. *Trager*, 445 Mich at 107. Further, plaintiff's reliance on *Rickrode v Wistinghausen*, 128 Mich App 240, 247; 340 NW2d 83 (1983), is misplaced because in that case this Court specifically relied on evidence presented that the defendant knew her cat had previously scratched small children.

In the present case, there is no record of any prior incidents involving the birds. Even if one of defendants' birds flapped its wings in plaintiff's direction,[2] that behavior is common for birds and is more analogous to a dog barking, which is not inherently dangerous. If the bird did flap its wings, and even if it did fly at plaintiff, her reaction of falling was fairly unusual, especially given the size of the bird and the lack of evidence of any prior incidents. Furthermore, even if there were prior incidents, plaintiff could not identify the specific bird involved in this incident, thus, it could not be determined whether defendants would have had "notice" regarding that specific bird. Therefore, the trial court correctly held there was no genuine issue of material fact regarding defendants' negligence for failure to restrain or control the birds and defendants were entitled to judgment as a matter of law.

Plaintiff also argues that defendants were negligent in failing to properly train or educate its employees. However, plaintiff failed to state any case law that supported this contention. "This Court will not search for authority either to sustain or reject a party's position. Where a party fails to cite any supporting legal authority for its position, the issue is effectively abandoned." *Schellenberg v Rochester Mich Lodge No 2225*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

However, even if this Court were to entertain plaintiff's position, the trial court properly granted defendants' motion for summary disposition. In her testimony, plaintiff could not identify whether the person accompanying the bird was in fact defendants' employee or a member of the Eden Alternative program. Plaintiff did not name the Eden Alternative program as a defendant and did not present evidence regarding its obligations with regard to placement and training of the birds. Thus, again, plaintiff cannot show that defendants owed a duty to her. This Court has been clear that the question of duty "turns on the relationship existing between the actor and the injured person." *Krass v Tri-County Security, Inc*, 233 Mich App 661, 668; 593

[2] Defendants have no record of the incident alleged by plaintiff and the only witness plaintiff relied on in her incident report has no memory of plaintiff or the incident in question.

NW2d 578 (1999). However, if plaintiff cannot identify the actor, this Court is unable to determine whether a relationship exists.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto